IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs July 27, 2004

STATE OF TENNESSEE v. VICKI D. WALDEN

Appeal from the Criminal Court for Campbell County
No. 11514 E. Shayne Sexton, Judge

No. E2003-02710-CCA-R3-CD - Filed October 15, 2004

The defendant, Vicki D. Walden, pleaded guilty to the sale of Schedule III controlled substances, a Class D felony. By agreement with the state, the defendant was to be sentenced as a Range III offender, subject to a sentencing range of eight to twelve years. The length of the sentence and the manner of service were reserved for the trial court's determination. The trial court denied alternative sentencing and imposed a twelve-year incarcerative sentence. On appeal, the defendant argues that she should have received an eight-year sentence making her eligible for probation, community corrections, or split confinement. For the following reasons, we affirm the judgment.

Tenn. R. App. P. 3; Judgment of the Criminal Court is Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which DAVID H. WELLES and JERRY L. SMITH, JJ., joined.

Timothy P. Webb, Jacksboro, Tennessee, for the Appellant, Vicki D. Walden.

Paul G. Summers, Attorney General & Reporter; Seth P. Kestner, Assistant Attorney General; William Paul Phillips, District Attorney General; and Michael O. Ripley, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

The defendant has a lengthy criminal history, which includes at least nine convictions for drug-related offenses. The facts underlying the conviction before us are sketchy. We quote from the "Circumstances of the Offense" section of the Presentence Investigation Report:

> The circumstances of the offense are described as follows from the notes of Detective David Webber of the Campbell County Sheriff's Department regarding the drug purchase.

> "Met Confidential informant and arranged to go to Vicky [sic] Walden[']s old house at 754 Pleasant Ridge Road. We have been to this residence and purchased from Pamela Lane and Clifford Lane who live there. Confidential informant had heard that Vicky [sic] was back there.
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> Confidential informant arrived and went in and called out Vicky's [sic] name[;] she answered from the back room. Confidential informant went back to the bedroom where she wa[s] at. The T.V. was very loud like she always has it and Vicky [sic] was on the bed. The confidential informant said Vicky [sic] had a bottle full of Hydro[]s[,] and he purchased 5 of them from her for $5 a pill total of $25.00. Confidential informant left and met us at the brick church up from her residence."

At the sentencing hearing conducted on October 15, 2003, the defendant testified that she was currently living with her son-in-law, grandchildren, and her former husband. The defendant described her health as extremely poor: "I'm on oxygen 24 hours a day. I have emphysema[;] I suffer from blood clots in the lung, and I'm on medication, blood thinners; breathing treatments every six hours." She added that because of her physical limitations, she was confined to her residence such that she could comply with a supervised house-arrest type of sentence.

On cross-examination, the defendant said that she had been disabled for a long time, beginning in 1980 and worsening over the years. She admitted not maintaining any gainful employment during that period of time. She also admitted that she had been convicted previously for selling controlled substances on numerous occasions and that her disability had not hampered her selling ability. Further, despite receiving probation for earlier offenses, she had re-offended and was on probation at the time she committed the instant offense. In terms of breaking the cycle of criminal behavior, the defendant claimed that she had "finally realized" what was going to happen to her. She lamented the loss of her home and grandchild and summarized her situation as having "lost [her] life over drugs." In response to the court's question, the defendant related that she was 54 years old, and she admitted being a "drug dealer."

Defense counsel argued in favor of alternative sentencing claiming that the defendant "would not be able to take any confinement and stay alive" and that the defendant had "learned her lesson." The state advocated a maximum twelve-year sentence to be served consecutively to her effective eleven-year sentence that she was serving at the time of her arrest. The court began its sentencing determination with the following observation:

> [W]hat we have here is a drug dealer over and over and over, incorrigible, and that is quite a -- quite a concern of this Court.

> I have no tools available to make her understand. We talked about house arrest, and I understand [defense counsel] raising it, but I also understand the State's response, that this -- putting her in her own house is exactly what we did the last time and then four months later she was doing it -- she was selling drugs again.

The court then sentenced the defendant to an incarcerative term of twelve years, as a Range III persistent offender, to be served concurrently with her prior sentences. In imposing the maximum sentence within the range, the court found two enhancement factors: (1) a previous history of criminal convictions in addition to those necessary to establish the appropriate range, Tenn. Code Ann. § 40-35-114(2) (2003); and (2) a previous history of unwillingness to comply with conditions of a sentence involving release into the community, *id*. § 40-35-114(9) (2003). The court considered, but gave negligible weight to, the criminal conduct neither causing nor threatening serious bodily harm. *See id*. 40-35-113(1) (2003).

Aggrieved by the length and manner of service of her sentence, the defendant has appealed.

The law is well settled that before a trial court imposes a sentence upon a convicted criminal defendant, it must consider (a) the evidence adduced at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) evidence and information offered by the parties on the enhancement and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; and (f) any statement the defendant wishes to make in the defendant's own behalf about sentencing. *See* Tenn. Code Ann. § 40-35-210(b) (2003); *State v. Imfeld*, 70 S.W.3d 698, 704 (Tenn. 2002). To facilitate appellate review, the trial court is required to place on the record its reasons for imposing the specific sentence, including the identification of the mitigating and enhancement factors found, the specific facts supporting each enhancement factor found, and the method by which the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. *See State v. Samuels*, 44 S.W.3d 489, 492 (Tenn. 2001).

Upon a challenge to the sentence imposed, this court has a duty to conduct a *de novo* review of the sentence with a presumption that the determinations made by the trial court are correct. *See* Tenn. Code Ann. § 40-35-401(d) (2003). However, this presumption "is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). If our review reflects that the trial court followed the statutory sentencing procedure, that the court imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then the presumption is applicable, and we may not modify the sentence even if we would have preferred a different result. *See State v. Pike*, 978 S.W.2d 904 (Tenn. 1998). We will uphold the sentence imposed by the trial court if (1) the sentence complies with the purposes and

principles of the 1989 Sentencing Act, and (2) the trial court's findings are adequately supported by the record. *See State v. Arnett*, 49 S.W.3d 250, 257 (Tenn. 2001). The burden of showing that a sentence is improper is upon the appealing party. *See* Tenn. Code Ann. § 40-35-401 (2003) Sentencing Commission Cmts.; *Arnett*, 49 S.W.3d at 257.

A defendant who does not possess a criminal history showing a clear disregard for society's laws and morals, who has not failed past rehabilitation efforts, and who "is an especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." Tenn. Code Ann. § 40-35-102(6) (2003). *See also State v. Fields*, 40 S.W.3d 435, 440 (Tenn. 2001). The following considerations provide guidance regarding what constitutes "evidence to the contrary" which would rebut the presumption of alternative sentencing:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
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> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant[.]

Tenn. Code Ann. § 40-35-103(1) (2003); *see also State v. Hooper*, 29 S.W.3d 1, 5 (Tenn. 2000). Additionally, the principles of sentencing reflect that the sentence should be no greater than that deserved for the offense committed and should be the least severe measure necessary to achieve the purposes for which the sentence is imposed. *See* Tenn. Code Ann. § 40-35-103(2), (4) (2003). The court should also consider the defendant's potential for rehabilitation or treatment in determining the appropriate sentence. *See id.* § 40-35-103(5) (2003).

In addition, a defendant who receives a sentence of eight years or less is eligible for probation as a sentencing option. *See id.* § 40-35-303(a), (b) (2003). "The trial court's determination of whether the defendant is entitled to an alternative sentence and whether the defendant is a suitable candidate for full probation are different inquiries with different burdens of proof." *State v. Kenneth Jordan*, No. M2002-01010-CCA-R3-CD, slip op. at 4 (Tenn. Crim. App., Nashville, May 8, 2003) (citing *State v. Boggs*, 932 S.W.2d 467, 477 (Tenn. Crim. App. 1996)). The burden is upon the defendant to show she is a suitable candidate for probation. Tenn. Code Ann. § 40-35-303(b) (2003); *State v. Goode*, 956 S.W.2d 521, 527 (Tenn. Crim. App. 1997); *Boggs*, 932 S.W.2d at 477. To sustain this burden, the defendant must show that the sentence imposed was improper and that full probation would be in the best interest of the defendant and the public. *E.g.*, *State v. Baker*, 966 S.W.2d 429, 434 (Tenn. Crim. App. 1997).

The defendant in this case argues that she was entitled to the presumption of favorable candidacy for alternative sentencing options because her conviction was for a class D felony. The defendant, however, overlooks the qualifying criterion that an offender must be "an especially mitigated or standard offender" for the presumption to arise. The defendant is a Range III persistent offender; therefore, the presumption does not apply. *See State v. Anderson*, 985 S.W.2d 9, 18-19 (Tenn. Crim. App. 1997) ("Although convicted of a Class E felony, the defendant was sentenced as a Range III, persistent offender and no presumption for alternative sentencing is afforded him.").

Regarding probationary sentencing, and putting aside the length of the sentence actually imposed, we have no difficulty concluding that the defendant failed to shoulder the affirmative burden of demonstrating why such sentence would "subserve the ends of justice and the best interest of both the public and the defendant." *State v. Bingham*, 910 S.W.2d 448, 456 (Tenn. Crim. App. 1995), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1, 9 (Tenn. 2000). As for a community-based alternative to incarceration, we fail to see how the defendant could meaningfully participate in such a program given her claimed disabilities.

Last, regarding the length of the defendant's sentence, we discern no basis to disturb the presumption that the determinations made by the trial court are correct. The defendant has amassed an impressive history of criminal convictions, and by her own sworn admissions, she has a demonstrated track record of unwillingness to comply with conditions of a sentence involving release into the community. Moreover, we discern no impact on sentencing in this case from the Supreme Court's pronouncements in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), and *Blakely v. Washington*, 542 U.S. ___, 124 S. Ct. 2531 (2004). From those decisions, we know that the Sixth Amendment's prohibition of increasing punishment beyond the "statutory maximum" based upon an additional judge-made finding does not apply to "the fact of a prior conviction." *See Apprendi*, 530 U.S. at 490, 120 S. Ct. at 2362. The defendant's extensive record of prior convictions, in our opinion, fully justifies a maximum sentence for this Range III persistent offender.

Accordingly, we affirm the judgment of the trial court.

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JAMES CURWOOD WITT, JR., JUDGE